JOE TROW

IBLA 89-361 Decided May 12, 1992

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting a Notice of Intent to Conduct Mining Operations
and requiring submission of a plan of operations for approval. M 77776.

Affirmed.

1. Mining Claims: Plan of Operations--Wild and Scenic Rivers Act

Under 43 CFR 3809.1-4(b)(2), an approved plan of operations is required prior to commencing any operation except casual use in areas designated as a potential addition or an actual component of the national wild
and scenic rivers system.

2. Statutory Construction: Generally--Wild and Scenic Rivers Act

The general requirement of 16 U.S.C. § 1274(b) (1988) that the boundaries of each component of the national wild and scenic river system designated by 16 U.S.C. § 1274(a) (1988) shall include an average of not more than 320 acres per mile on both sides of the river does not apply to river areas that Congress has specifically defined by reference to a map.

3. Mining Claims: Plan of Operations--Wild and Scenic Rivers Act

Because Departmental regulation 43 CFR 3809.1-4(b)(2) requires approval of a plan of operations prior to commencing any operation except casual use in areas designated as a potential addition to the national wild
and scenic rivers system as well as actual components thereof, any operation within the boundaries on a map identified as a river area under 16 U.S.C. § 1274(a) (1988) is subject to this regulatory requirement without regard to whether actions necessary to establish the boundaries under 16 U.S.C. § 1274(b) (1988) have been completed, even though the map includes land in addition to the area indicated when the river was listed as a potential addition under 16 U.S.C. § 1276 (1988).

APPEARANCES: Joe Trow, Lewiston, Montana, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Joe Trow has appealed from the March 13, 1989, decision of the Montana State Office, Bureau of Land Management (BLM), rejecting a Notice of Intent to Conduct Mining Operations and requiring him to submit a plan of operations for approval. The issue raised in this appeal is whether appellant must submit a plan of operations under 43 CFR 3809.1-4(b)(2) which requires a plan of operation for any operation except casual use in "[a]reas designated for potential addition to, or an actual component of the national wild and scenic rivers system." BLM asserts the claims lie within the management corridor of the Upper Missouri National Wild and Scenic River.

Despite the apparent simplicity of the issue in this appeal, it arises from a plethora of challenges by appellant to numerous actions taken or proposed by BLM with respect to the management of the Upper Missouri Breaks Wild and Scenic River Area since 1976 when that river was added to the National Wild and Scenic River System, resulting in a case record several inches thick. Many of appellant's challenges have no direct bearing on this appeal, but relate to alleged misconduct by BLM in providing inadequate responses to his persistent inquiries. Furthermore, by arguing that he is not required to file a plan of operations because his claims lie outside the wild and scenic river area, Trow rejects the application of BLM's management plan for that area to his claims. 1/ Nevertheless, our jurisdiction extends no further than providing an answer to the single issue identified in the previous paragraph. Other complaints appellant may have about BLM are not properly before us.

[1] The regulations published under 43 CFR Part 3809 pertain to surface management of mining claims and cite three statutes as authority: 30 U.S.C. § 22 (1988), 43 U.S.C. § 1201 (1988), and 43 U.S.C. §§ 1701-1782 (1988). In 43 CFR 3809.0-3, BLM adds 30 U.S.C. § 612 (1988) and 16 U.S.C. § 1280 (1988) to the list. Together these statutes provide ample authority for BLM to require approved plans of operation for mining activity on all lands administered by BLM, not only those lands in specially designated areas. Indeed, as originally proposed, regulations in that part would have required approval of a plan of operations to be obtained prior to any mining activity except certain enumerated minor uses on any land administered by BLM. See 43 FR 13961 (Mar. 3, 1980). In the final regulations, however, BLM chose not to exercise the full measure of its authority; the level of

1/ Another appeal by Trow concerned a letter that explained how management actions taken between 1975 and 1989 to establish boundaries for the Upper Missouri Wild and Scenic River affected current management planning in effect in 1989. Because that letter did not constitute a decision, we dismissed Trow's appeal. Joe Trow, 119 IBLA 388 (1991). In the instant appeal, Trow raises many of the same arguments we listed earlier. Id. at 390-91.

activity requiring a plan of operations was changed except for "special category" lands. 45 FR 78909 (Nov. 26, 1980). Consequently, under 43 CFR 3809.1-4(b)(2), an approved plan of operations is required prior to commencing any operation except casual use in "[a]reas designated for potential addition to, or an actual component of the national wild and scenic river system." Appellant argues that the land on which he intends to conduct operations lies outside the area defined by that regulation. BLM contends otherwise.

Components and potential additions to the national wild and scenic river system that are designated by Congress are defined by statute, 16 U.S.C. §§ 1274, 1276 (1988). 2/ The segment of the Missouri River involved in this appeal is described as follows: "Missouri, Montana.--The segment from Fort Benton one hundred and forty-nine miles downstream to Robinson Bridge, as generally depicted on the boundary map entitled 'Missouri Breaks Freeflowing River Proposal', dated October 1975, to be administered by the Secretary of the Interior." 16 U.S.C. § 1274(a)(14) (1988). Appellant's claims are located in sec. 9, T. 23 N., R. 20 E., Principal Meridian, Montana. The map referenced by the statute shows not only that all of sec. 9 falls within the designated area, but that much
of the land in the adjacent sections was similarly included. Indeed, the designated area near appellant's claims extends more than 1 mile on either side of the river. The statute describes the area "as generally depicted" on the map, but no subsequent action has eliminated any part of sec. 9 from the designated area. 3/

Nevertheless, appellant contends that the extent of adjacent land included within the river area is limited by 16 U.S.C. § 1274(b) (1988), which provided as follows when the Missouri River was added to the system
in 1976:

> The agency charged with the administration of each component
> of the national wild and scenic river system designated by subsection (a) shall, within one year from October 2, 1968, establish detailed boundaries therefor (which boundaries shall include an average of not more than three hundred and twenty acres per mile on both sides of the river); determine which of
> the classes outlined in section 1273(b) of this title best fit the river or its various segments; and prepare a plan for necessary developments in connection with its administration in accordance

2/ States may seek designation of rivers under 16 U.S.C. § 1273 (1988). See Wilderness Society v. Tyrrel, 918 F.2d 813 (9th Cir. 1990).

3/ Appellant's challenge to the validity of this map has no merit insofar as his claims are concerned. The statute designating the river authorizes the acquisition of land within the river area so as to provide "rim-to-rim protection for the river corridor." Section 203(b)(1), Act of Oct. 12, 1976, P.L. 94-486, 90 Stat. 2327 (1976). The Missouri River flows through the section in which appellant's claims are located, and any contour map will show this section is well within the rims.

with such classification. Said boundaries, classification, and development plans shall be published in the Federal Register and shall not become effective until ninety days after they have been forwarded to the President of the Senate and Speaker of the House of Representatives. [Emphasis added.]

16 U.S.C. § 1274(b) (1970). 4/ When the subject segment of the Missouri River was added to subsection (a) by the Act of October 12, 1976, P.L. 94-486, 90 Stat. 2327 (1976), section 202 of that statute required the Secretary to establish boundaries pursuant subsection (b) "within one year of enactment of this Act."

Because this appeal involves a "component of the national wild and scenic river system designated by subsection (a)," appellant contends that the boundaries relied upon by BLM cannot include an average of more than 320 acres per mile on both sides of the river and are required to "be published in the Federal Register and shall not become effective until ninety days after they have been forwarded to the President of the Senate and Speaker of the House of Representatives." Appellant's repeated inquiries under the Freedom of Information Act, 5 U.S.C. § 552 (1988), have yielded no document showing BLM's compliance with the requirements of 16 U.S.C. § 1274(b) (1988). See Joe Trow, 119 IBLA 388, 390 (1991).

Appellant correctly contends that the area depicted on the October 1975 map vastly exceeds the 320-acres-per-mile limitation set forth above. Indeed, a boundary extending 1 mile on each side of the river would embrace a total of about 1,280 acres on both sides for each mile of river. For parts of the river such as the area in which appellant's claims are located,

4/ Subsection (b) now provides as follows:

"The agency charged with the administration of each component of the national wild and scenic river system designated by subsection (a) of this section shall, within one year from the date of designation of such component under subsection (a) (except where a different date if [sic] provided in subsection (a)) of this section, establish detailed boundaries therefor (which boundaries shall include an average of not more than 320 acres of land per mile measured from the ordinary high water mark on both sides of the river), and determine which of the classes outlined in section 1273(b) of this title best fit the river or its various segments.

"Notice of the availability of the boundaries and classification, and of subsequent boundary amendments shall be published in the Federal Register and shall not become effective until ninety days after they have been forwarded to the President of the Senate and Speaker of the House of Representatives."

16 U.S.C. § 1274(b) (1988) (emphasis added). Subsection (c) relates to the availability of maps boundaries and description of classification. Subsection (d)(1) describes the requirements relating to management plans for rivers designated on or after Jan. 1, 1986, while subsection (2) requires agencies to review boundaries, classifications, and plans for rivers designated before that date within 10 years through the regular agency planning process.

the area described by the October 1975 map extends more than 1 mile on each side.

Appellant correctly states that the 320-acres limitation corresponds to acreage withdrawn from mining under 16 U.S.C. § 1280 (1988) which withdraws one-quarter of a mile on each side of the river. Because this Board has already held that his claims lie mostly outside the one-quarter mile withdrawal, 5/ appellant believes that they would also be outside any management area established in compliance with the 320-acres-per-mile limitation of subsection (b). In essence, appellant contends that BLM has failed to comply with subsection (b) of 16 U.S.C. § 1274 (1988), and if BLM had designated the area in compliance with that subsection no plan of operations would be required for his claims under BLM's current regulations.

Appellant's argument is perceptive; on its face, the 320-acres-per-mile limitation of subsection (b) appears to apply to subsection (a)(14). Nevertheless, the application of subsection (b) would yield a boundary vastly different from the area "generally depicted on the boundary map entitled 'Missouri Breaks Freeflowing River Proposal', dated October 1975." The result of applying subsection (b) could not be accurately described as establishing "detailed boundaries" for the area "generally depicted on the boundary map." In view of this conflict between subsection (a)(14) and subsection (b), we must decide which of these provisions has controlling effect.

In order to resolve the conflict between the two provisions, it is helpful to study their origins. In considering various bills that preceded the original Wild and Scenic Rivers Act in 1968, this Department summarized differences in the pending bills in an attachment to an August 14, 1967, letter to Representative Aspinall, Chairman of the House Committee on Interior and Insular Affairs. H.R. Rep. No. 1623, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News, 3801, 3837 (1968). With respect to their differences in the method of establishing boundaries, some bills "designate[d] the boundaries * * * by reference to certain maps referred to in the bills" while other bills "use[d] the concept of a narrow ribbon for the national scenic river areas; that is, it provides that such areas may include not more than a total of 320 acres per mile, with detailed boundaries to be established as soon as practicable after the enactment of the bill: * * *." Id. at 3838. Thus, a designation of rivers using a map would require little boundary redefinition, and it was only where the "narrow ribbon" concept was used that the 320-acres limitation and provision for subsequent delineation of detailed boundaries became important. The "narrow ribbon" concept was adopted for all of the rivers originally designated in 1968, and the boundary confirmation provision of subsection (b) properly

5/ See John R. Lynn, Joe Trow, 106 IBLA 317 (1989) (Spitoon #3); Joe Trow, IBLA 89-18 (Jan. 19, 1989) (Spitoon #1, #2, #4, and #5), where we found that claims were not shown to be invalid by decisions finding they were located within the management area, where it was not shown that the claims were also within one-quarter mile of the stream.

included the 320-acres-per-mile limitation and the provision for the establishment of detailed boundaries 1 year later. See 16 U.S.C. § 1274(a)(1) through (8), (b) (1988).

After 1968, however, Congress sometimes did not employ the "narrow ribbon" concept in designating rivers but adopted boundaries from a map,
as in the case of the Missouri River and others that were designated by the Act of October 12, 1976, 16 U.S.C. § 1274(a)(13), (14), and (15) (1988).

[2] The 1976 Act and its legislative history make it absolutely clear that Congress did not intend the river area to be defined by the 320-acres-per-mile limitation. The House Report observes: "The study by the Department of the Interior found this entire area qualified for inclusion in
the system." H.R. Rep. No. 657, 94th Cong., 2d Sess. 3 (1976) (emphasis added). Section 203(b)(1) of the 1976 Act gave the Secretary acquisition authority "so as to provide, wherever practicable and necessary for the purposes of this Act and the Wild and Scenic Rivers Act, rim-to-rim protection for the river corridor." (Emphasis added.) It would have been impossible for the Secretary to implement this authority if the river area were limited as provided in section 1274(b). To conform with the cannon
of statutory construction that general provisions are qualified by specific ones, we must therefore conclude that the 320-acres-per-mile limitation in 16 U.S.C. § 1274(b) (1988) does not apply to river areas that Congress has defined by reference to a map. See Robertson v. Seattle Audubon Society, __ U.S. __, 112 S. Ct. 1407, 1414 (1992); 2B Southerland Statutory Construction § 51.05 (5th ed. 1992).

Although we have shown that the 320-acres-per-mile limitation in subsection (b) cannot be applied to this river area, there is no obvious conflict with the procedural requirements of that subsection. The fact that subsection (a)(14) refers to the boundaries as being "generally depicted" on a map is not inconsistent with the requirement in subsection (b) for subsequent establishment of detailed boundaries. Subsection (b) also requires that the boundaries and management plan be published in the Federal Register and BLM complied with this requirement, although not by October 12, 1977, as the 1976 act required. 45 FR 4474 (Jan. 22, 1980). 6/ Nevertheless, subsection (b) does not provide that
the boundaries become effective upon publication in the Federal Register, but expressly provides that the boundaries "shall not become effective
until ninety days after they have been forwarded to the President of the Senate and Speaker of the House of Representatives." (Emphasis added.)
As we noted in another appeal by Trow, BLM "explained that there is no

6/ BLM's compliance was not timely but was more than 2 years overdue. Nonetheless, appellant's arguments concerning the untimeliness of BLM's boundary designations and management plans are ultimately unavailing, because appellant was required to comply with their provisions after they became effective. It was certainly not Congress' intent to preclude forever any protection of the river area Congress designated simply because
an agency failed to file its management plan before the date specified.

documentary evidence that the plan was submitted to Congress before 1989." Joe Trow, 119 IBLA 388, 391 (1991). 7/

BLM's apparent failure to forward the boundaries and plan to Congress cannot be lightly disregarded. BLM itself properly insists on strict compliance with statutory filing requirements. See, e.g., United States v. Locke, 471 U.S. 84 (1985). In Rowell v. Andrus, 631 F.2d 699 (10th Cir. 1980), the court held that a BLM regulation could not become effective until the expiration of the time period provided by an applicable statute. More significantly, the United States Court of Appeals for the Ninth Circuit (which includes Montana) has twice refused to enforce a requirement by the Forest Service for the filing of a plan of operations for mining because
the requirement was procedurally defective. In both cases, the court found that the agency's regulations and forms did not display an Office of Management and Budget control number as required by the Paperwork Reduction Act, 44 U.S.C. § 3507(f) (1988). United States v. Hatch, 919 F.2d 1394 (9th Cir. 1990); United States v. Smith, 866 F.2d 1092 (9th Cir. 1989).

Although it is not clear when BLM, if ever, took the final action required by subsection (b) to establish the boundaries of the wild and scenic river area, BLM's failure does not excuse appellant from complying with BLM's regulations. The regulation not only requires a plan of operations for mining in wild and scenic river areas but also in potential additions to the wild and scenic river system as well. See, e.g., Pierre J. Ott, 122 IBLA 371 (1992). We recognize that when the Missouri River was first listed as a potential addition, the "narrow ribbon" concept was employed with the result that the area of appellant's claims was mostly outside the area of the potential addition. See 16 U.S.C. § 1276(a)(13) (1988). Nevertheless, Congress expanded the area to provide rim-to-rim protection when it designated the river in 1976, and even if BLM failed to take the action necessary to establish the final boundaries, the potential of the rim-to-rim area for addition to the system pending final action cannot be denied. We cannot treat the congressional designation of the actual river area under 16 U.S.C. § 1274(a) (1988) as having less of an effect than the designation of a potential addition under section 1276.

[3] Because Departmental regulation 43 CFR 3809.1-4(b)(2) requires approval of a plan of operations prior to commencing any operation except casual use for areas designated as a potential addition to national wild and scenic rivers system as well as actual components thereof (see Pierre J. Ott, supra), we hold that any operation within the boundaries on a map identified as a river area under 16 U.S.C. § 1274(a) (1988) is subject to this regulatory requirement without regard to whether actions necessary
to establish the boundaries under 16 U.S.C. § 1274(b) (1988) have been completed, even though the operative map includes land in addition to the area indicated when the river had been listed as a potential addition under 16 U.S.C. § 1276 (1988).

7/ The record in this appeal does not make it clear whether BLM has since submitted the plan to Congress.

Appellant has requested a hearing before an Administrative Law Judge pursuant to 43 CFR 4.415. A hearing is necessary only where there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. United States v. Consolidated Mines & Smelting, Ltd., 455 F.2d 432, 453 (9th Cir. 1971); KernCo Drilling Co., 71 IBLA 53, 56 (1983). Although appellant asserts that there are many disputed facts, there appear to be no disputed facts that are pertinent to the legal issues in this appeal or which would require us to reach a different result. Accordingly, appellant's request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge